



STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
820 NORTH FRENCH STREET, 11TH FLOOR
WILMINGTON, DELAWARE 19801

NORMAN A. BARRON
CHIEF MAGISTRATE

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POLICY DIRECTIVE 81-052

TO: ALL JUSTICES OF THE PEACE, STATE OF DELAWARE
ALL CHIEF CLERKS, COURTS OF THE JUSTICES OF THE PEACE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: DECEMBER 28, 1981

RE: PUBLIC DISCLOSURE OF PROBABLE CAUSE SHEETS IN THE POSSESSION
OF THE COURTS OF THE JUSTICES OF THE PEACE

*Received
8-594*

Hypothetical

Detective Jones appears before Justice of the Peace Faire seeking authorization of a warrant for the arrest of John Doe on the charge of Murder in the first degree. Detective Jones prepares a written Affidavit of Probable Cause and swears to same before Judge Faire who authorizes an arrest warrant to issue on the basis of the facts contained in the probable cause sheet as well as the contents of the sworn-to complaint.

John Doe is arrested on the warrant and is taken before a Justice of the Peace who, because the offense is a capital crime, commits the defendant without bail. The Court papers are sent to the Court of Common Pleas for preliminary hearing purposes, the

Justice of the Peace Court keeping copies of all papers for its file. Prior to the CCP preliminary hearing, John Doe's attorney comes to the Justice of the Peace Court requesting a copy of the probable cause sheet. An hour later, a member of the news media appears at the Court with the same request. Should either request be granted?

As to both, the answer, in my view, is negative. With respect to the attorney for John Doe, the rationale behind the Court's denial would be the same as with a request to obtain an affidavit for a search warrant. See: Policy Directive 81-033, dated February 9, 1981.

With respect to the news reporter, or to any other member of the public for that matter, the primary rationale for the Court's denial of access would be predicated upon Chapter 100 of Title 29 of the Delaware Code, as amended, the State's Freedom of Information Act. While all public records shall be open to inspection and copying by any citizen of the State during regular business hours, 29 Del.C., §10003(a), the question is whether a probable cause sheet, prepared by the police, is a "public record" of the Court, that is, a public Court record. 29 Del.C., §10002(d) defines a public record as follows:

"(d) "Public record" is written or recorded information made or received by a public body¹ relating to public business.

¹"Public body" means any regulatory, administrative, advisory, executive or legislative body of the State or any political subdivision of the State including, but not limited to, any board, bureau, commission, department, agency, committee, counsel (sic), legislative committee,

For purposes of this chapter, the following records shall not be deemed public:

* * * * *

(4) Criminal files and criminal records, the disclosure of which would constitute an invasion of personal privacy. Any person may, upon proof of identity, obtain a copy of his personal criminal record. All other criminal records and files are closed to public scrutiny. Agencies holding such criminal records may delete any information, before release, which would disclose the names of witnesses, intelligence personnel and aids or any other information of a privileged and confidential nature;

* * * * *

(9) Any records pertaining to pending or potential litigation which are not records of any court . . ." (Emphasis added.)

On the basis of the above, one may conclude that a probable cause sheet prepared by a police officer is a "public record" made by an employee of a "public body", that is, a police agency. But, under either 29 Del.C., §10002(d) (4) or §10002(d) (9), such a record would be excluded from inspection by the public. If one were to view a probable cause sheet as a Court record, it would not become such until the record becomes a record in a Court proceeding

1 (continued)

association, or any other entity established by an act of the General Assembly of the State which: (1) is supported in whole or in part by public funds; (2) expends or disburses public funds; or (3) is specifically sharged by any other public body to advise or make recommendations." 29 Del.C., §10002(a).

On the basis of the above-quoted definition, I am unable to conclude that a Court is a "public body". If the Legislature had intended that the contents of a court file of a court case should be open to public scrutiny, then the Legislature could very easily have included "a Court" or "the Judiciary" within the definition of a public body. However, the Legislature, in its wisdom, choose not to do so. Nor do I.

in that Court which has jurisdiction to decide the sufficiency of probable cause to justify the charge.² In our hypothetical, that Court is the Court of Common Pleas where a probable cause hearing is held with respect to felony charges.

To argue, however, that the Justice of the Peace Court must disclose the contents of the probable cause sheet because a copy of said sheet is contained in the Court's case file is to argue that while the front door is closed, by some application of jurisprudential alchemy the back door remains open. Stated otherwise, if the police do not have to disclose the contents of the probable cause sheet which constitutes a record of the police agency, then the purpose of such an exclusion from disclosure is defeated if the public can gain access to the very same information by another avenue. I note that a probable cause sheet is not included within the list of information which may be made public in accordance with the Guidelines for the Reporting of Criminal Proceedings of the Bar-Bench Press Declaration of Delaware And Conference Constitution of June, 1978. Further, under the section entitled, "Accessibility of Public Records" found in said Declaration is the following:

"Court litigation records, on file in the offices of the clerks of the several courts of the State, may be routinely inspected during business hours by news representatives in the offices where such records are filed, except as otherwise provided by law . . ." (Emphasis added.)

²" . . . [C]ourt proceedings will take place in public and records of those proceedings will be available for public inspection." Bar-Bench Press Declaration of Delaware. Before inspection is permitted, the Bar-Bench Press Declaration seems to suggest that the Court proceeding must have first been held. As was stated in the case of Civ.C., Del.Supr., 320 A.2d 717 (1974): "It is generally held that judicial records are subject to inspection after completion of the proceedings, but this rule too is subject to the discretionary power of the court to impound and deny inspection when justice so requires."

Since Delaware's Freedom of Information Act does not provide for the inspection of probable cause sheets and, in fact, excludes them from public access, probable cause sheets would appear to fall within the exception clause of the Bar-Bench Press Declaration as set forth above.

Other reasons exist for concluding that the probable cause sheet contained in a Justice of the Peace Court criminal case file is not accessible to the public. It is a Court's duty to ensure that a defendant is not prejudiced by adverse pre-trial publicity. As was stated by Deputy Chief Magistrate Russell T. Rash, "Non-disclosure by the Court is in the interest of the accused. Certainly you don't want to lay probable cause out there for the public prematurely, because members of the public become jurors."³ Moreover, there is an ethical prohibition against judicial comment on a pending case. See: Cannon 3A (6) of the Delaware Judges' Code of Judicial Conduct.

The above is not to suggest that Court personnel may not, in the interest of promoting an informed citizenry, release to the news media, upon request, certain information regarding the status of a particular case. Policy Directive 80-021, dated October 24, 1980, sets forth the information obtainable from a Justice of the Peace Court by the news media as follows:

³ Delaware State News, November 8, 1981, page 13. Support for Judge Rash's position is found in the Bar-Bench Press Declaration of Delaware: "Decisions as to the handling of news should be made with the following in mind:

". . . We should cooperate with the news media within the bounds of propriety. Therefore, when a member of the news media telephones the Court for information on a particular case, court personnel are authorized to release the following information:

- a. Defendant's name and address;
- b. the charge or charges and the dates thereof;
- c. the defendant's bail status;
- d. the trial date and time, if applicable;
- e. the disposition of the case, including any sentence imposed, if applicable;
- f. the name and address of the victim, except when a sex-related offense is alleged, in which case, the victim's name and address should be withheld; and
- g. the name of any attorney of record.

If factual information regarding the incident in question is requested, court personnel are authorized to read the charge as set forth in the complaint⁴ and no more. If the caller is dissatisfied with the information as released, he should be advised to contact the Chief Magistrate."

3 (continued)

- (a) an accused person is presumed innocent until proven guilty;
- (b) readers, listeners and viewers are potential jurors or witnesses;
- (c) coverage should be factual and balanced so that both sides of cases are reported. It is unfair to report only a portion of the facts as though they were the only facts . . ." (Emphasis added.)

⁴The complaint is a written statement made by the complainant upon oath or affirmation of the essential facts constituting the offense charged. It includes the title, section and any subsection designation of the Delaware Code which is allegedly violated. Rule 4(b) of the Justice of the Peace Court Rules of Criminal Procedure; Rule 3 of the Superior Court Rules of Criminal Procedure. In this regard,

Through such a policy, a delicate balance between a defendant's right to a fair trial and the public's right to be informed is maintained.⁵

4 (continued)

it is akin to an indictment or information. Demonia v. State, Del. Supr., 210 A.2d 303 (1965). At the defendant's initial appearance or arraignment, it is the duty of the Court to read the contents of the complaint to the defendant or state to him the substance of the charge. Rule 6(b) 1. of the Justice of the Peace Court Rules of Criminal Procedure. See also: Rule 10 of the Superior Court Rules of Criminal Procedure.

⁵See: Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978).

NAB:pn

cc: The Honorable Daniel L. Herrmann
John R. Fisher
Files



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POLICY DIRECTIVE 81-052 (SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE, STATE OF DELAWARE
ALL CHIEF CLERKS, COURTS OF THE JUSTICES OF THE PEACE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: MARCH 18, 1983

RE: DISCLOSURE OF PROBABLE CAUSE SHEETS TO THE DEFENSE

In Policy Directive 81-052, dated December 28, 1981, Public Disclosure Of Probable Cause Sheets In The Possession Of The Courts Of The Justices Of The Peace, I indicated that the probable cause sheet connected with a criminal arrest warrant should not be disclosed by Court personnel to the defense for the same reason that an affidavit for a search warrant should not be disclosed by Court personnel to the defense.¹

Although I adhere to the belief that the above-stated position is technically correct, I have concluded, for the reasons set forth below, that probable cause sheets connected with arrest warrants

¹With regard to search warrant affidavits, see Policy Directive 81-033, dated February 9, 1981, Release Of Search Warrant Affidavits. Of course, search warrant affidavits and arrest warrant probable cause sheets are discoverable, in any event, under the discovery rules of all of Delaware's trial courts.

should now be available to defendants to the same extent as the arrest warrants and the charge sheets at the time of the defendant's initial appearance before a Justice of the Peace.

First, subsequent to the issuance of Policy Directive 81-052, the arrest warrant forms were radically changed so as to allow for the listing of multiple charges on one warrant. The procedures with regard to the new Complaint And Summons/Warrant form were explained in Policy Directive 82-065, dated August 20, 1982, New Justice Of The Peace Court Criminal Form No. 1, Complaint And Summons/Warrant; New Bail And Disposition Sheet.

Under the new Complaint And Summons/Warrant form,² the Charge Sheet³ is attached to the Summons/Warrant as Exhibit A while the Probable Cause Sheet⁴ is attached to the Summons/Warrant as Exhibit B. Both exhibits are specifically, by the very wording of the Summons/Warrant, attached thereto and incorporated therein. Thus, the Summons/Warrant is not complete without both the Charge Sheet and the Probable Cause Sheet attached thereto. Clearly, a defendant is entitled to receive, at his initial appearance, a copy of the warrant.⁵ Now that the Probable Cause Sheet is specifically made an

²Criminal Form No. 1.

³Criminal Form No. 5.

⁴Criminal Form No. 12.

⁵This conclusion is made by reading together Rule 3(b), Rule 4(b) and Rule 6(b) of the Justice of the Peace Court Rules of Criminal Procedure.

integral part of the Summons/Warrant, the defendant is entitled to a copy of said document as well.

Second, subsequent to the issuance of Policy Directive 81-052, the Multi-Purpose Criminal Justice Facility became operational. Justice of the Peace Court No. 18 is located within said facility. Present during normal Court operational hours is an Assistant Public Defender and a Deputy Attorney General. Denying access to the defendant of the Probable Cause Sheet connected with an arrest warrant hampers the effective utilization of the Multi-Purpose Criminal Justice Facility. By permitting access to the defendant of the Probable Cause Sheet, defense counsel will have at an earlier stage of the criminal proceeding greater knowledge of the background of the case and may, therefore, be in a position to arrange with the State a speedier disposition of said case. That this result would occur at the Multi-Purpose Criminal Justice Facility clearly would increase the effective utilization of said facility.⁶

In light of the above, effective immediately, at the time of a defendant's initial appearance in a Justice of the Peace Court, the defendant or his legal counsel should be provided with a copy of the Complaint And Summons/Warrant, the Charge Sheet attached thereto and incorporated therein as Exhibit A and the Probable Cause

⁶ So as to create uniformity and consistency, the scope of this Policy Directive Supplement should not be limited to Court No. 18 initial appearances. In fact, to do so, would raise equal protection arguments. Thus, this Policy Directive is to be given effect throughout the State.

Sheet attached thereto and incorporated therein as Exhibit B.⁷

This Supplement to Policy Directive 81-052 should not be construed as affecting present policy regarding the disclosure of the contents of Probable Cause Sheets to members of the news media or to the public in general by Court personnel. Policy Directive 81-052 continues to control with regard to such disclosures.

NAB:pn

cc: The Honorable Daniel L. Herrmann
John R. Fisher
Eugene M. Hall, Esquire
Keith Trostle, Esquire
Lawrence M. Sullivan, Esquire
Files

⁷All three documents are three-ply with a white original, a pink copy and a yellow copy. Normal practice contemplates that the white original shall stay with Justice of the Peace Court file, while the pink copies shall be forwarded to the appropriate higher Court and the yellow copies shall be provided to the defendant. Should copies be sought by the State or by the police, they may be photocopied from the originals.



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CHIEF MAGISTRATE

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POLICY DIRECTIVE 81-021 (REVISED)
POLICY DIRECTIVE 81-033 (RESCINDED)
POLICY DIRECTIVE 81-052 and 81-052
(Supplement)(RESCINDED) ✓

TO: ALL JUSTICES OF THE PEACE
JUSTICE OF THE PEACE CLERKS OF COURT

FROM: PATRICIA W. GRIFFIN *PWG*
CHIEF MAGISTRATE

DATE: August 5, 1994

RE: RELEASE OF INFORMATION

*Rescinded
8-5-94*

APPLICABILITY OF RELEASE OF INFORMATION POLICY TO
DEFENSE COUNSEL

Policy Directive 81-33, Release of Search Warrant Affidavits, dated February 9, 1981, Policy Directive 81-052, Public Disclosure of Probable Cause Sheets in the Possession of the Justices of the Peace, dated December 28, 1981, and Policy Directive 81-052 (Supplement), Disclosure of Probable Cause Sheets to the Defense, dated March 18, 1983, are hereby rescinded. Policy Directive 81-021 (Revised), Release of Information, dated August 17, 1988, applies to the release of information to defense counsel as well as members of

the news media.¹ Accordingly, copies of search and arrest warrants, including the affidavits of probable cause, should be provided to defense counsel upon request unless the Court has ordered all or part of the file sealed. Factors to be considered in determining whether to have the file sealed are enumerated in Policy Directive 81-21 (Revised).

Judge Gebelein, in a hearing on defense counsel's motion to seal the probable cause affidavit of the search warrant in State v. Pennell, Del. Super., IN 88-12-0051, 0053, Gebelein, J. (December 7, 1988), provided some guidance with regard to the sealing of warrant documents. He stated that the decision to seal the documents turns on the question whether the right to a fair trial of the party seeking to seal the documents would be irreparably damaged by the release of the information and whether there are alternative safeguards which would protect the rights of the party to receive a fair and impartial trial. Id., Tr. at 3-4. [See attached.] In the Pennell case, Judge Gebelein, released the search warrant application, return and probable cause affidavits requested by the news media, although the search warrant return was

¹ If a member of the press is permitted to obtain a copy of the probable cause affidavit and defense counsel is denied access, then an anomalous result occurs -- information contained in that document could be released to all members of the public but defense counsel cannot see it. This would encourage defense counsel to contact members of the news media to have them request the information needed by defense counsel.

released in redacted form since the Court concluded that certain items of personal property listed in the return "could have a prejudicial effect in [the] trial." Id., Tr. at 4.

In cases in which documents have been sealed or as appropriate, defense counsel has the option of seeking case-related documents, including court documents, through the discovery process initiated in the court in which the case will be heard. See Rule 16 of the Superior Court Rules of Criminal Procedure (for felonies), Rule 16 of the Court of Common Pleas Criminal Rules and Justice of the Peace Court Criminal Rule 12 (for misdemeanors).

NON-RELEASE OF CERTAIN VICTIM'S INFORMATION

Finally, Policy Directive 80-021 (Revised), dated August 17, 1988, should be revised to delete the address of the victim from the list of information to be provided to the news media or other members of the public by the Court. See section (f) on p.2 of Policy Directive 80-021 (Revised). With regard to victim's information, only the victim's name should be provided. (The Victims' Bill of Rights provides that the victim's address, place of employment and telephone number is exempt from disclosure under the Freedom of Information Act. 11 Del.C. § 9403.) Before releasing affidavits of probable cause or other case related documents to defendant and/or others, clerks must ensure that the

victim's address, place of employment and telephone number are deleted. (I suggest using a black magic marker or whiting out the information on a copy of the original document and then making a copy of the document with the information deleted for release to the defendant or others.)

PWG:lba
Attachment.

cc: Hon. E. Norman Veasey
Hon. Randy J. Holland
Hon. Henry duPont Ridgely
Hon. Vincent J. Poppiti
Hon. Arthur F. DiSabatino
Hon. Alfred Fraczkowski
Thomas W. Nagle
Anna A. Lewis
H. John Betts
Alderman's Courts
Law Libraries: New Castle County, Kent County, Sussex County &
Widener University School of Law
Digilaw, Inc.

1 In any such case, it is the Defendant's burden
2 to establish;

3 First, that a fair trial right will be
4 irreparably damaged by the release of the information
5 involved;

6 Second, that there did not exist alternative
7 safeguards to insure a fair and impartial trial to
8 actually protect his rights.

9 In this case, the Defendant has established, in
10 my opinion, through the hearing, that his right to a fair
11 trial may be in jeopardy, and I say that because this case
12 involves the most sensational investigation conducted in
13 Delaware History. It has been extensively covered by the
14 news media, and the Defendant has gone into two news
15 articles in the last two days that have been sensational
16 in content and form, and he made a copy of those part of
17 the record, and I'm handing them to the Prothonotary at
18 this time.

19 After the hearing, however, the Defendant has
20 failed to establish that the information contained in the
21 documents, with a limited exception, would prejudice his
22 right to receive that fair trial.

23 Thus, it is the conclusion of the Court that the

1 documents shall be filed, with the exception that a search
2 warrant return shall be filed in the redacted form. The
3 reason for that is there's certain items of personal
4 property listed that could have a prejudicial effect in
5 this trial, and for that reason, the items have been
6 omitted.

7 All the documents shall be filed and open to the
8 public. The Court, at this time, is handing the original
9 of the applications for search warrants, search warrant
10 returns and a redacted copy of the search warrant return
11 to the Prothonotary to file.

12 Court's in recess till the call of the Court.

13 * * *

14 (Court recessed at 3:48 p.m.)

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